

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

EMPLOYEE PAINTERS' TRUST,

Plaintiff,

v.

FISCHER GENERAL CONTRACTING,
INC.; DANIEL FISCHER; TAMARA
FISCHER; ELAINE FISCHER; and
SUSAN JOHNSON,

Defendants.

CASE NO. C12-5648 RBL

ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

[DKT. #21]

THIS MATTER is before the Court on Defendants Tamara Fischer, Elaine Fischer, and Susan Johnson's motion for summary judgment. [Dkt. #21]. In 2005, Daniel Fischer, acting as president and majority owner of Fischer General Contracting, Inc., signed a collective bargaining agreement with the International Union of Painters and Allied Trades District Council No. 5 ("IUPAT"). The CBA stipulated that for every hour a union painter worked for FGCI, FGCI had to pay a certain amount to the Employee Painters' Trust. FGCI avoided making these payments by regularly hiring non-union painters. The Trust alleges that FGCI was contractually obligated to only hire union painters and that it owes the Trust damages because it breached that duty.

1 FGCI is now defunct and Daniel Fischer has declared bankruptcy. Fischer's debt to the
2 Trust was discharged. The Trust seeks damages from Susan Johnson, a former FGCI director¹.
3 Johnson asks the Court to find (1) that FGCI does not, as a matter of law, owe the Trust damages
4 and (2) that Johnson cannot, as a matter of law, be held personally liable for FGCI's debt to the
5 Trust.
6

7 **I. BACKGROUND**

8 FGCI was a licensed general contractor incorporated in Washington in 2001. At
9 incorporation, Fischer was FGCI's president and sole shareholder. At no time has he held less
10 than 95.5% of FGCI's outstanding shares of stock.

11 When FGCI incorporated, Johnson was a director, a vice president, and the treasurer, but
12 she received no compensation for her roles and rarely worked more than two days a week. Her
13 main duty was to act as liaison to accountants and banks. She was not allowed to exercise
14 discretionary authority; she did only what Fischer told her to do. She could sign checks on
15 behalf of FGCI, but only when she received authorization from Fischer.
16

17 In 2005, Fischer signed the CBA on behalf of FGCI. Johnson did not sign the CBA and
18 Fischer did not seek her approval or allow her to look over the CBA before signing. The CBA
19 covered the period from March 2005 to February 2010. It obligated FGCI to pay a certain
20 amount to the Trust for every hour it paid a union painter to work.
21

22 Later in 2005, Johnson received 150 shares of FGCI stock (1.5% of the outstanding
23 shares) as a bonus.

24 When the CBA term ended in February 2010, IUPAT audited FGCI. It determined FGCI
25 had hired non-union painters to perform many hours of work. It claimed this was a breach of the
26

27 ¹The Trust initially sought damages from Tamara Fischer, Elaine Fischer, and Susan Johnson, but it has conceded
28 that Tamara Fischer and Elaine Fischer cannot be held personally liable for FGCI's failure debt to the Trust.

1 CBA and sought damages in an amount equal to what FGCI would have paid the Trust had it
2 hired union painters to work those hours. Soon thereafter, Johnson resigned from her positions
3 at FGCI, and FGCI repurchased her stock.

4 In 2012, FGCI lost its contractor's registration bond, and went out of business. Fischer
5 filed for bankruptcy and obtained a discharge of his personal liability for FGCI's debt to the
6 Trust. There is no plan to resurrect FGCI. Most of FGCI's assets were turned over to its lender,
7 and the lender has a priority security interest in the rest.
8

9 On July 20, 2012, the Trust sued FGCI, alleging that FGCI owed \$100,000 for the hours
10 it paid non-union painters. It also claimed that Johnson was personally liable for the debt. The
11 defendants ask this Court to determine as a matter of law that (1) FGCI does not owe the Trust
12 any damages and (2) even if FGCI is liable to the Trust, Johnson is not personally liable.
13

14 II. DISCUSSION

15 A. Summary Judgment Standard.

16 Summary judgment is appropriate if the facts, when viewed in the light most favorable to
17 the nonmoving party, show there is no genuine issue of material fact and the moving party is
18 entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the
19 burden of demonstrating the absence of genuine issue of material fact, or asserting an absence of
20 evidence supporting an essential element of the non-moving party's claim. *Celotex Corp. v.*
21 *Catrett*, 477 U.S. 317, 323 (1986). In opposing a motion for summary judgment, the non-
22 moving party may not rely on its own pleadings, but rather must set forth facts that show the
23 existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).
24
25
26
27
28

B. FGCI owes the Trust damages because it hired non-union painters.

1. FGCI breached its duty to only hire union painters.

Art 5.1 of the CBA required FGCI to only subcontract to union employers. It states:

An Employer who is party to this Agreement shall not subcontract work covered by this Agreement to be done at a construction job site to any Employer unless such Employer is a party to a collective bargaining agreement with [IUPAT].

FGCI argues that this article actually prohibited FGCI from hiring union laborers. It claims the CBA defined “Employer” to mean “Employer that has signed the CBA” and then claims that when that definition is plugged into Art. 5.1, it shows that FGCI was prohibited from hiring union organizations. [Dkt. 21]. This argument fails for three reasons.

First, substituting “Employer that has signed the CBA” in for “Employer” does not cause Art. 5.1 to say that FGCI was prohibited from hiring union laborers; it makes the passage wildly redundant and nearly nonsensical (and under *Flynn v. Dick Corp.*, the Court is never to presume that parties have included meaningless or redundant terms in their agreements. 481 F.3d 824, 831 (D.C. Cir. 2007)). Second, applying this definition to the rest of the CBA turns several other passages into gibberish as well. Third, the CBA’s stated purpose is to increase business for union organizations. This purpose is stated repeatedly throughout the contract so there is no way FGCI could have reasonably believed that Art. 5.1 discouraged FGCI from hiring union laborers.

Art. 5.1 shows that FGCI was required to hire union workers and FGCI freely admits that it regularly hired non-union workers. Therefore FGCI breached its duty under the CBA.

2. FGCI owes damages in the amount of money equal to what the Trust would have received had FGCI hired union painters.

The Court has ruled “where a union signatory breaches a prohibition on subcontracting contained in a [CBA], the union trust may recover the contributions that would have been made as damages for the breach.” *Brogan v. Swanson Painting Co.*, 682 F.2d 807, 809 (9th Cir. 1982).

1 This rule shows that the Trust is entitled to damages so the Court cannot find, as a matter of law,
 2 that FGCI does not owe the Trust damages.

3 **C. Susan Johnson is not personally liable for FGCI's debt to the Trust.**

4 **1. Johnson cannot be personally liable because she did not sign the CBA**
 5 **and there is no reason to believe that she should have signed the CBA.**

6 The Trust argues that "[w]here a written agreement so provides, corporate officers of a
 7 delinquent employer may be held liable for unpaid contributions." *Mencher v. Weiss*, 114
 8 N.E.2d 177, 32 L.R.R.M. (BNA) 2539, 24 L.C. 67,797 (N.Y. 1953). It points to Art. VIII, § 8 of
 9 the CBA, which states:

10 ...in the event any corporate Participating Employer which is obligated to make
 11 contributions to the Trust fails to make such contributions, the President, the
 12 Treasurer, and any other corporate officer who is responsible for payment of
 13 contributions by the corporation to the Trust fund shall be each individually liable
 for the payment of contributions and any other due...

14 The Trust cites several cases where the Court held corporate officers personally liable for their
 15 corporations failing to meet similar CBA obligations. However, the cases are weak analogies; in
 16 every one of them, the officers held personally liable had accepted the liability either by signing
 17 a CBA or by promising to sign a CBA.

18 The Trust relies most heavily on *Emp. Painters' Trust v. Ethan Enterprises*. 480 F.3d
 19 993, 1000-01 (9th Cir. 2007). In *Ethan*, the directors were held personally liable when their
 20 corporation breached the CBA, even though they did not sign it. But *Ethan* is entirely
 21 distinguishable from this case because the directors in *Ethan* had (1) promised to sign the CBA
 22 in 2004 and (2) been ordered to sign it by the Court in 2005. *N.L.R.B. v. Ethan Enterprises*, No.
 23 04-74905, 154 Fed.Appx. 23 (9th Cir. 2005). When Ethan was sued again in 2007 and the
 24 directors tried to argue that they could not be personally liable because they had not yet signed
 25 the CBA, the Court quickly dismissed their argument. *Ethan Enterprises*, 480 F.3d at 1000.
 26
 27
 28

1 Nothing like that happened in this case. Johnson never promised to sign the CBA and
 2 she was never ordered to sign it by the Court. Johnson did not sign it because she was not a
 3 particularly important FGCI employee. Therefore the Trust's effort to hold her personally liable
 4 as a signatory is unsupportable as a matter of law.

5
 6 **2. Johnson cannot be personally liable because she did not exercise
 7 actual control over plan assets.**

8 To be a fiduciary under ERISA, a person must exercise "any authority or control
 9 respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A)(i). However,
 10 the Ninth Circuit has determined that "[a] person...who performs only ministerial services or
 11 administrative functions within a framework of policies, rules, and procedures established by
 12 others is not an ERISA fiduciary." *Arizona State Carpenters' Trust Fund v. Citibank*, 125 F.3d
 13 715, 722 (9th Cir. 1997). The Ninth Circuit has also determined that unpaid employer
 14 contributions may be considered plan assets when plan documents identify them as such. *ITPE*
 15 *Pension Fund v. Hall*, 334 F.3d 1011, 1013 (11th Cir. 2003).

16 The Trust claims that Johnson is personally liable because the unpaid contributions are
 17 plan assets², which Johnson had control over because she had signatory authority over FGCI's
 18 bank accounts³. However, both Johnson and Fischer insist that Johnson was only allowed to use
 19 her signatory authority when authorized by Fischer. The Trust has not even tried to contradict
 20 this claim. Since Johnson only did what Fischer told her to do, she was working within a
 21 framework that someone else established. Therefore she cannot be considered an ERISA
 22 fiduciary as a matter of law and she is not personally liable under this theory either.
 23
 24
 25

26 ²The CBA does identify unpaid contributions as plan assets so the Trust is correct on this point.

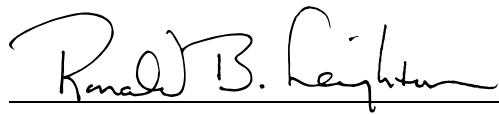
27 ³It also argues that she "implemented FGCI's bookkeeping procedures," but this argument has been ignored because
 28 the "implementation" amounted to installing freely available bookkeeping software.

III. CONCLUSION

FGCI's motion for determination as a matter of law that it owes no debt to the Trust is **DENIED**. Johnson's motion for a determination as a matter of law that she is not personally liable for FGCI's debt to the Trust is **GRANTED**.

IT IS SO ORDERED.

Dated this 27th day of September, 2013.

A handwritten signature in black ink, reading "Ronald B. Leighton", written over a horizontal line.

RONALD B. LEIGHTON
UNITED STATES DISTRICT JUDGE